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No. 06-1321

In the Supreme Court of the United States

MYRNA GOMEZ-PEREZ, PETITIONER

v.

JOHN E. POTTER, POSTMASTER GENERAL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the federal-sector provision of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 633a(a), permits a federal employee to sue her employing agency for alleged retaliation under the Act.

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BRIEF FOR THE RESPONDENT

STATEMENT

1. a. Congress enacted the Age Discrimination in Employment Act of 1967 (ADEA or the Act), 29 U.S.C. 621 *et seq.*, with two principal provisions governing the conduct of *private* employers in 29 U.S.C. 623. Section 623(a)(1) makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. 623(a)(1). Separately, Section 623(d) establishes an anti-retaliation provision, which makes it unlawful for an employer to "discriminate against any of his employees or applicants for employment * * * because such individual * * * has opposed any practice made unlawful by this section, or because such individual * * * has made a charge, testified, assisted, or participated in any manner in an

investigation, proceeding, or litigation under [the Act]." 29 U.S.C. 623(d).

Because the ADEA's 1967 definition of "employer" did "not include the United States * * * or a State or political subdivision thereof," ADEA, Pub. L. No. 90-202, § 11(b), 81 Stat. 605, the Act applied only to the private-employment context until 1974. In that year, Congress amended the ADEA in two ways to provide statutory protections for public-sector employees. First, Congress extended Section 623's existing anti-discrimination and anti-retaliation provisions to state employers by revising the Act's definition of "employer" to include "a State or a political subdivision of a State." See Fair Labor Standards Amendments of 1974 (FLSA Amendments), Pub. L. No. 93-259, § 28(a)(2), 88 Stat. 74 (amending 29 U.S.C. 630(b)).

Second, the 1974 amendments added 29 U.S.C. 633a to the Act to establish a self-contained provision governing federal-sector employment, rather than simply extending the private-sector provision to federal agencies as Congress did for the states. FLSA Amendments § 28(b)(2), 88 Stat. 74. Section 633a(a) provides that, in specified federal agencies, including the United States Postal Service (USPS):

> All personnel actions affecting employees or applicants for employment who are at least 40 years of age * * * shall be made free from any discrimination based on age.

29 U.S.C. 633a(a).

In Section 633a(b), Congress also directed the Civil Service Commission (CSC)—and later, the Equal Employment Opportunity Commission (EEOC)—"to enforce the provisions of subsection (a) through appropri-

ate remedies," to process and take final action on "complaints of discrimination in Federal employment on account of age," and to "issue such rules, regulations, orders, and instructions it deems necessary and appropriate to carry out its responsibilities under [Section 633a]." FLSA Amendments § 28(b)(2), 88 Stat. 75 (enacting 29 U.S.C. 633a(b)). In addition, in Section 633a(c), Congress further authorized aggrieved persons who either have filed an equal employment opportunity (EEO) "complaint concerning age discrimination with the Commission" or have given notice of their intent to sue to bring a civil action in district court for "such legal and equitable relief as will effectuate the purposes of [the Act]." 29 U.S.C. 633a(c) and (d).

In 1978, Congress further revised the ADEA and enacted the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 2301 *et seq.*, with provisions supplementing the ADEA's prohibition on age discrimination in federal employment. First, Congress added subsection (f) to Section 633a of the ADEA, providing that "[a]ny personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of [the ADEA], other than the provisions of section 631(b) of this title and the provisions of this section."[1] 29 U.S.C. 633a(f).

The CSRA, in turn, codified a series of "prohibited personnel practices" in executive agencies. 5 U.S.C. 2302(a)(1), (2)(C) and (b). As is relevant here, the CSRA states that federal employees with authority concerning

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[1] Section 631(b) states that, "[i]n the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 633a of this title, the prohibitions established in section 633a of this title shall be limited to individuals who are at least 40 years of age." 29 U.S.C. 631(b).

any "personnel action" shall not, in exercising that authority, "take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of * * * the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation" or the employee's "testifying for or otherwise assisting any individual in the exercise of any [such] right." 5 U.S.C. 2302(b)(9).

b. Many USPS employees are excepted from the CSRA and are covered instead by collective-bargaining agreements or a personnel system developed by the USPS. 39 U.S.C. 410(a), 1001, 1206(b), 1209(a). In authorizing those alternative personnel systems, Congress required the USPS to "assure its officers and employees * * * full protection of their employment rights by guaranteeing them an opportunity for a fair hearing on adverse actions." 39 U.S.C. 1001(b).

The USPS personnel system accordingly prohibits "any action, event, or course of conduct that * * * subjects any person to reprisal for prior involvement in EEO activity." USPS, *Employee and Labor Relations Manual* § 665.23, at 681-682 (June 2007) (*ELM*) <http://www.usps.com/cpim/manuals/elm/elm.htm>. All collective-bargaining agreements incorporate that prohibition against retaliation and prohibit discipline that is either "punitive" or not "for just cause." See *Agreement Between the USPS and the National Postal Mail Handlers Union* arts. 16.1, 19.1 (2000) (*Mail Handlers Agreement*) <http://www.npmhu.org/Resource/Agreement/USPSNPMHU2000NationalAgreement.pdf>; American Postal Workers Union, AFL-CIO & USPS, *National Collective Bargaining Agreement* arts. 16.1, 19 (July 19, 2007) (*National Agreement*) <http://www.apwu.org/dept/ind-rel/sc/APWU Contract 2006-2010.pdf>.

2. a. In 2002, petitioner worked as a full-time USPS employee in Dorado, Puerto Rico. Pet. App. 2a. In October of that year, petitioner's request to transfer to a part-time, permanent position about 70 miles away in Moca, Puerto Rico was granted by her supervisor effective November 2, 2002. *Id.* at 2a, 17a-18a; J.A. 32. Later in November, petitioner requested to be transferred back to the Dorado Post Office, and her request was denied. Pet. App. 2a, 18a. In February 2003, petitioner (who was then 45 years old) filed an EEO complaint with the USPS alleging that the denial of her second transfer request was the result of age discrimination. *Id.* at 2a, 19a.

Petitioner contends that she subsequently experienced various forms of retaliation for filing her administrative complaint. Petitioner claims that her co-workers began to harass her; that her peers defaced and wrote her name on USPS posters related to sexual harassment; that "her supervisor[s] called her to meetings during which groundless complaints [of sexual harassment] were leveled against her"; and that "her supervisors complained that she was sexually harassing her co-workers, when in fact she was not." Pet. App. 2a-3a; J.A. 32, 34. Petitioner further states that her part-time work hours were significantly reduced. Pet. App. 3a.

b. Petitioner filed suit in the United States District Court for Puerto Rico alleging age discrimination and retaliation under the ADEA. Pet. App. 19a. The district court granted summary judgment to the government on petitioner's claim of age discrimination, *id.* at 20a, and dismissed petitioner's retaliation claim on the ground that the ADEA did not waive the government's sovereign immunity from retaliation-based claims. *Id.* at 21a-32a. The district court explained that it "is settled law"

that waivers of sovereign immunity must "be narrowly construed in favor of the sovereign" and held that Section 633a of the ADEA does not waive such immunity from retaliation claims. *Id.* at 22a, 29a-30a. Among other things, the court concluded that the language Congress enacted to prohibit retaliation by private employers in Section 623(d) of the Act demonstrates that the text in Section 633a(a) does not prohibit retaliation. *Id.* at 29a-30a.

c. The court of appeals affirmed. Pet. App. 1a-10a. The court ruled that, while "sovereign immunity does not present a bar to bringing an ADEA suit against the USPS" because the Postal Reorganization Act, 39 U.S.C. 101 *et seq.*, waives the USPS's sovereign immunity, the statutory "prohibition on 'discrimination based on age'" in Section 633a(a) of the Act does not authorize plaintiffs "to bring a cause of action against the federal government for retaliation." *Id.* at 2a, 4a.

The court explained that the "plain text" of Section 633a(a) "clearly prohibits discrimination against federal employees (over forty years old) based on age, but says nothing that indicates that Congress meant for this provision to provide a cause of action for retaliation for filing an age-discrimination related complaint." Pet. App. 4a-5a. The court found this omission significant because there is a "clear difference between a cause of action for discrimination and a cause of action for retaliation." *Id.* at 5a. Whereas a "substantive [anti-discrimination] provision seeks to prevent injury to individuals based on who they are, *i.e.*, their status," an "anti-retaliation provision seeks to prevent harm to individuals based on what they do," not "who they are." *Ibid.* (quoting *Burlington N. & Santa Fe Ry.* v. *White*, 126 S. Ct. 2405, 2412 (2006)). Given that basic difference, the court con-

cluded that if "Congress had meant to provide for both causes of action, it would have said so explicitly." *Ibid.*

The court of appeals further found that its conclusion was confirmed by the structure of the ADEA and its private-sector retaliation provision. Pet. App. 7a-8a. The court noted that Section 623(d)'s anti-retaliation provision specifically focuses on protected conduct rather than status in prohibiting an employer from discriminating against an employee because she either "has opposed any practice made unlawful by this section" or has "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under [the Act]." *Ibid.* (quoting 29 U.S.C. 623(d)). Given that Congress used such particular anti-retaliation language in Section 623(d) but omitted similar language from Section 633a(a), the court concluded Congress acted "intentionally and purposefully in the disparate inclusion or exclusion." *Id.* at 8a (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)). Indeed, the court found that conclusion particularly appropriate here, because Congress "demonstrated that it knew how to provide a statutory right" to protection against retaliation by doing "so elsewhere in the very 'legislation cited.'" *Id.* at 9a (quoting *Lehman* v. *Nakshian*, 453 U.S. 156, 162 (1981)).

The court further explained that, by enacting Section 633a(f) to specify that federal personnel actions in Section 633a(a) "shall not be subject to, or affected by," any other provision of the Act, Congress specifically indicated that it "did not want the expansive private-sector provisions of the ADEA extended to federal employees." Pet. App. 9a-10a. Section 633a(f), the court explained, distinguishes the ADEA from the federal-sector provision of Title VII of the Civil Rights Act of 1964,

42 U.S.C. 2000e *et seq.*, which several courts have concluded expressly incorporates Title VII's private-sector retaliation provision. *Id.* at 9a.

The court of appeals rejected petitioner's contention that *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167 (2005), supports a contrary result. Pet. App. 6a-7a. First, it explained that *Jackson* involved the scope of a judicially created cause of action inferred from Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, and that *Jackson* specifically rejected comparisons to Title VII on this ground because, in the inferred rights context, the judiciary assumes primary responsibility for defining the contours of the right inferred. *Id.* at 6a. Second, the court observed that *Jackson* based its holding in part on a conclusion that did not readily apply in the ADEA context, namely, that a retaliation remedy was necessary to further Title IX's objectives because coaches and teachers, although not themselves the targets of sex discrimination, were often in the best position to identify such discrimination in educational programs. *Id.* at 6a-7a. Finally, the court noted that Title IX was enacted against the backdrop of *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), which had held that a statute barring discrimination based on race gave rise to an inferred right of action to sue for retaliation. Pet. App. 7a. The court concluded that the nature of the statute and policies in *Jackson* were different from those involved in the ADEA, and, thus, declined to extend *Jackson* to the ADEA context. *Ibid.*

SUMMARY OF ARGUMENT

The court of appeals correctly held that the ADEA does not create a private right of action for retaliation in the federal-sector context.

A. Section 633a(a) of the ADEA provides that, in certain federal agencies including the USPS, "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age * * * shall be made free from discrimination based on age." 29 U.S.C. 633a(a). The most natural reading of that prohibition on "age" discrimination, especially in contrast to the private-sector provisions separately prohibiting discrimination and retaliation, is that it prohibits discrimination based on the status—that is, the age—of the individual subjected to the personnel action, not the individual's participation in EEO activity.

Other provisions of the ADEA confirm that Section 633a(a) does not confer an anti-retaliation right. First, as noted, the private-sector provisions of the ADEA contain an express anti-retaliation provision that protects all employees (not just those 40 and above) from retaliation and clearly defines the treatment constituting retaliation as being taken *because of* the employee's conduct, *i.e.*, the employee's opposition to a discriminatory practice or participation "in any manner" in the EEO process. 29 U.S.C. 623(d). Second, Congress underscored its intent to separate the federal-sector prohibitions in Section 633a(a) from the Act's private-sector provisions—including Section 623(d)—by adding Section 633a(f), which states that the federal-sector provisions "shall not be subject to, or affected by, any other provision [of the Act]." That section precludes engrafting the separate anti-retaliation prohibition in Section 623(d)

onto Section 633a. See *Lehman* v. *Nakshian*, 453 U.S. 156 (1981).

Jackson v. *Birmingham Board of Education*, 544 U.S. 167 (2005), does not support the contrary conclusion. *Jackson* made clear that its construction of Title IX turned on the particular statutory context of that statute and the inferred nature of the cause of action. The Court emphasized statutory context by explaining that Title IX was "vastly different" from Title VII because Title IX includes only one, unelaborated prohibition on "discrimination" whereas Title VII includes multiple and more detailed provisions that illustrate that Congress gave the term "discrimination" different meanings in different contexts within Title VII. *Id.* at 175. Here, the separate and distinct prohibitions on discrimination and retaliation in Section 623(a)(1) and (d) make it difficult to conclude that the single prohibition in Section 633a(a) does the same work as the two separate provisions in Section 623. In addition, the Court in *Jackson* pointed out that "Title IX's cause of action is implied, while Title VII's is express." *Ibid.* While courts have a responsibility to ensure that a cause of action they infer is workable and sensible, the courts' responsibility when confronted with two distinctly worded express causes of action is to give Congress's different approaches different effects.

B. Congress's decision to leave retaliation outside the scope of Section 633a(a) does not leave federal employees without a remedy for retaliation. The remedy lies in the distinct protections of the Civil Service Reform Act (CSRA). The CSRA prohibits personnel practices taken in retaliation for the exercise of an employee's rights under the ADEA or the employee's participation in the EEO process, and establishes a right of

judicial review. The Court should avoid construing Section 633a in a manner that could disrupt the careful balance struck by Congress in declining to address retaliation in Section 633a, but rather establishing a comprehensive statutory framework of administrative and judicial review of retaliatory personnel actions. While the USPS operates under a distinct personnel system, that system provides an analogous bar on retaliation to USPS employees like petitioner, with an appropriate means of challenging allegedly retaliatory action.

C. Petitioner's contention that Section 633a(a) of the ADEA prohibits retaliation because Congress generally patterned the text of Section 633a(a) on Title VII's federal-sector provision is incorrect. This Court has declined to engraft Title VII law onto the ADEA where there are textual differences between the statutes. *Smith* v. *City of Jackson*, 544 U.S. 228, 240 (2005). While several courts of appeals have concluded that Title VII's federal-sector provision prohibits retaliation, that conclusion is based on the fact that Title VII's federal-sector provisions expressly *incorporate* a portion of Title VII's private-sector provisions addressing retaliation. The ADEA, in contrast, specifically states that the federal personnel actions subject to Section 633a(a) "shall not be subject to" any of the Act's private-sector provisions. 29 U.S.C. 633a(f). That textual distinction only reinforces the conclusion that Section 633a(a) of the ADEA, unlike the Act's private-sector provisions, does not prohibit retaliation.

D. Petitioner's reliance on the legislative history of the ADEA is unavailing. The legislative history does not address whether Congress intended Section 633a(a) to prohibit retaliatory personnel actions, and the few general statements that petitioner cites in that history are

consistent with the view that Congress intended Section 633a(a) to prohibit substantive age discrimination, but not retaliation. Therefore, although it is not necessary for the Court to delve into the legislative history to decide this case, what is there lends no credence to petitioner's construction of the Act.

E. Petitioner's contention that regulations issued by the CSC and the EEOC interpret Section 633a(a) as prohibiting retaliation is incorrect. The CSC and EEOC regulations governing the administrative processing of complaints cut against petitioner's position, because they confirm that both the CSC and the EEOC have continued to treat retaliation and age discrimination as distinct claims. Although the EEOC has made a "general policy" statement that persons should not be subjected to retaliation for opposing practices made unlawful by various statutes including the ADEA, that statement—added in 1992—does not purport to be a construction of Section 633a(a) and, in any event, is consistent with the fact that federal employees are already generally protected from reprisals for engaging in protected activity under the ADEA and other laws under the CSRA and related administrative regime.

F. To the extent that the Court has any doubt about the proper construction of Section 633a(a), the general rule against interpreting ambiguous statutes as creating new causes of action against the sovereign precludes recognizing a cause of action for retaliation under Section 633a. In the end, however, resort to legislative history and sovereign immunity principles is unnecessary. The plain text of Section 633a(a) and the contrast with the separate prohibitions on discrimination and retaliation in the private-sector provisions of the ADEA suffice

to reject petitioner's view and affirm the decision under review.

ARGUMENT

THE ADEA DOES NOT ESTABLISH A CAUSE OF ACTION AGAINST THE GOVERNMENT FOR RETALIATION IN THE FEDERAL-SECTOR CONTEXT

The statutory text and context both make clear that the federal-sector provision of the ADEA—Section 633a—does not provide a cause of action for a federal employee to sue for alleged retaliation under the Act. That does not mean that federal employees are without protection from retaliation in the workplace. To the contrary, a separate regime—now codified in the Civil Service Reform Act—has generally ensured that executive branch employees may challenge prohibited employment practices free from the threat of retaliation. That alternative remedy ensures that federal employees are generally not without protection against retaliation and explains Congress's decision to treat federal employees differently from all others.

Congress's enactment of Section 633a(a) of the ADEA in 1974 was just one step in a series of congressional and executive branch responses to the problem of discrimination in federal employment. Before 1974, the Civil Service Commission adjudicated employment-discrimination complaints under regulations that expressly prohibited retaliation in the EEO complaint process. Writing against that background, Congress enacted Section 633a to make age discrimination in federal personnel actions unlawful and to strengthen the CSC's existing administrative complaint process, while leaving retaliation claims to be adjudicated under the CSC's supervision. Congress subsequently confirmed in 1978

that the ADEA's private-sector anti-retaliation provision does not apply to the federal employment context and, that same year, substantially reformed federal personnel law to codify, among other things, the CSC's pre-existing authority to redress retaliation for employees' participation in EEO activity.

As explained below, the language of Section 633a, text and structure of other provisions within the ADEA, legal background surrounding the Act, and canons of construction applicable to statutory waivers of sovereign immunity all confirm that Section 633a(a) authorizes older employees to bring suit for prohibited age discrimination in federal personnel actions, but is not the source of federal employees' protection against retaliation based on participation in the EEO process. Instead, such retaliation claims must be pursued under other statutory and regulatory provisions governing federal employment practices.

A. The Plain Language Of Section 633a(a) And The Structure Of The ADEA Both Demonstrate That Section 633a(a) Does Not Prohibit Retaliation For Protected Activity

1. Section 633a(a) of the ADEA provides that, in certain federal agencies including the USPS, "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age * * * shall be made free from any discrimination based on age." 29 U.S.C. 633a(a). The most natural reading of that prohibition on "age" discrimination in personnel actions affecting individuals whose "age" is 40 or more is one that prohibits discrimination *based on the status*—and in particular, "age"—of the individual subjected to the personnel action, and not whether the individual—

regardless of his or her age—has engaged in EEO activity.

Like another substantive anti-discrimination provision this Court has addressed, Section 633a(a) promotes a "workplace where individuals are not discriminated against because of their * * * status" (age) and "seeks to prevent injury to individuals based on who they are" rather than "what they do." *Burlington N. & Santa Fe Ry.* v. *White*, 126 S. Ct. 2405, 2412 (2006) (*Burlington*).

Petitioner's position that Section 633a(a) provides broad protection from retaliation for participation in EEO activity is in considerable tension with the other restrictions that Congress included in the statutory language. First, Section 633a(a) excludes from its prohibition personnel actions affecting employees younger than 40 even though such employees may serve as representatives or witnesses or otherwise play important roles in the EEO process. Given that a significant percentage of employees in many if not most workplaces are younger than 40, it would be particularly anomalous for Congress to except such individuals from the scope of an anti-retaliation provision that applied to employees older than 40, since such younger employees would (by virtue of their numbers alone) serve as an important pool of potential witnesses. See 29 U.S.C. 631(b) ("[T]he prohibitions established in section 633a of this title shall be limited to individuals who are at least 40 years of age."). The private-sector anti-retaliation provision addresses this anomaly by extending the protection against retaliation beyond the class protected by the basic anti-discrimination provision to "any" employee. 29 U.S.C. 623(d). In the public-sector context, it remains an anomaly.

Second, the limited scope of Section 633a(a)'s core prohibition on age discrimination also is at odds with the argument that Section 633a(a) confers a broad, anti-retaliation right as well. Section 633a(a)'s protection is limited to "personnel actions," which, in the federal sector, involve employees' compensation, terms, conditions, and privileges of federal employment. See *George* v. *Leavitt*, 407 F.3d 405, 410-411 (D.C. Cir. 2005) (Title VII); *Page* v. *Bolger*, 645 F.2d 227, 233 (4th Cir.) (en banc) (Title VII), cert. denied, 454 U.S. 892 (1981); cf. 5 U.S.C. 2302(a)(2)(A) (defining "personnel action" in civil service context to include any "significant change in duties, responsibilities, or working conditions"). The text of Section 633a(a) does not reach "actions not directly related to * * * employment" or actions causing "harm outside the workplace," both of which this Court has found to be significant forms of retaliation. See *Burlington*, 126 S. Ct. at 2412. Section 633a(a) therefore is by its terms not designed to serve the broad function that petitioner suggests.

2. The surrounding provisions of the Act and "broader context of the statute as a whole," *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997), bolster the conclusion that Section 633a(a) prohibits age discrimination, but not retaliation for protected activity. As the court of appeals concluded, both the private-sector provisions of the ADEA and the 1978 amendments to the Act confirm that Congress left retaliation beyond the reach of Section 633a(a) and "that if Congress had meant to provide for [retaliation], it would have said so explicitly in § 633a." Pet. App. 5a; see *id.* at 7a-10a.

a. The ADEA's provisions governing the conduct of private-sector employers illustrate that, when Congress intended to prohibit retaliation in the Act, it used lan-

guage explicitly manifesting such intent. Section 623(d) explicitly protects all employees engaging in protected EEO activity. Section 633a(a)—the federal-sector provision—contains no similar retaliation language, and the strong presumption is that that omission reflects that Congress acted "intentionally and purposely" in including such language in Section 623 of the Act and excluding it from Section 633a. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citation omitted); see also *Burlington*, 126 S. Ct. at 2412; *Rodriguez* v. *United States*, 480 U.S. 522, 525 (1987).

The text prohibiting private-sector retaliation in Section 623 demonstrates the verbal formulation that Congress uses to proscribe retaliation in the ADEA context. Section 623(d) makes it unlawful for an employer to "discriminate against any of his employees * * * because such individual * * * has opposed any practice made unlawful by this section, or because such individual * * * has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under [the Act]." 29 U.S.C. 623(d). This formulation contains two traits distinguishing it as a prohibition on retaliation, both of which are absent from Section 633a(a).

First, Section 623(d) uses the term "discrimination," but, unlike Section 633a(a), does not contain the term "age." Instead, Section 623(d) specifically prohibits discrimination against "any" employee *because* of such employee's participation in EEO activity. That formulation reflects the essence of retaliation, that is, discriminatory treatment targeting employees "based on what they do, *i.e.*, their conduct," rather than "who they are." *Burlington*, 126 S. Ct. at 2412. Section 623(d) thus contrasts sharply with the Act's primary private-sector pro-

hibition on age discrimination in Section 623(a)(1), which prohibits "discriminat[ion]" against an employee "because of such individual's age." 29 U.S.C. 623(a)(1). Compared to these provisions, Section 633a(a)'s prohibition on "discrimination based on age" in personnel actions affecting employees only if they are "at least 40 years of age" parallels the substantive prohibition on age discrimination in Section 623(a) and bears no resemblance to the anti-retaliation right set forth in Section 623(d) of the Act's private-sector provisions.

Second, Section 623(d) does not contain limiting language restricting its prohibitions to "personnel actions," 29 U.S.C. 633a(a), or matters affecting the "compensation, terms, conditions, or privileges of employment," 29 U.S.C. 623(a)(1). Cf. *Burlington*, 126 S. Ct. at 2412, 2415 (construing parallel text in Title VII to prohibit retaliatory acts that a reasonable employee would find "materially adverse"). The absence of such language in Section 623(d) and its presence in Section 633a(a) reflect a difference in the purposes of the two provisions. Whereas an "anti-discrimination provision" like Section 633a(a) does "not need to prohibit anything other than employment-related discrimination," a retaliation provision like Section 623(d) may sweep more broadly to capture forms of retaliation that can occur outside the workplace. See *id.* at 2412.

Given these textual differences, it would be anomalous to interpret Section 633a(a) not only as a prohibition on age discrimination in federal employment, but also as a broad bar on retaliation. This Court has previously refused to read Section 633a as if it incorporates text used in ADEA provisions governing private employment, *Lehman* v. *Nakshian*, 453 U.S. 156 (1981), and it should similarly refuse to do so here.

The question in *Lehman* was whether Section 633a(c) authorizes jury trials in ADEA suits against the government. In concluding that it does not, the Court found it significant that Section 633a "contrasts" with the Act's private-sector provisions, which "expressly provide[] for jury trials." 453 U.S. at 162. Because Congress had "demonstrated that it knew how to provide a statutory right to jury trial when it wished to do so elsewhere in the very 'legislation cited,'" yet "failed explicitly to do so" in Section 633a, *Lehman* concluded that Section 633a should not be read as including the missing text. *Ibid.* (citation omitted). That reasoning applies with equal force here, since Congress "demonstrated [in Section 623(d)] that it knew how to provide a statutory right [against retaliation] when it wished to elsewhere in the very 'legislation cited,'" but "in [Section 633a] failed explicitly to do so." *Ibid.* (citation omitted).[2]

Petitioner relies heavily on this Court's decision in *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167 (2004). But *Jackson* cannot bear the weight that petitioner has placed on it and, in fact, the reasoning of *Jackson* cuts decidedly against petitioner.

In *Jackson*, the Court addressed the scope of the inferred right of action in Title IX of the Education Amendments of 1972, which provides that "[n]o person * * * shall, on the basis of sex, * * * be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C.

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[2] Petitioner's attempt to limit *Lehman* to contexts where two statutory provisions are nearly "identical," Br. 41-42, is inconsistent with the rationale of *Lehman*. When Congress has addressed a specific issue in one part of a statute with text clearly reflecting its intent, the absence of similar text in another part of the statute suggests that Congress did not intend the same result to hold in both places.

1681(a). After discussing the statutory context surrounding Title IX, and its enactment in the wake of this Court's decision in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), the Court held that Title IX includes an inferred private right of action for retaliation taken against a person because that person has complained of sex discrimination. *Jackson*, 544 U.S. at 173-174.

Jackson explained that the Court's prior decisions had repeatedly "construe[d] 'discrimination' under Title IX broadly," and that, in light of those decisions, "'[d]iscrimination' is a term that covers a wide range of intentional unequal treatment" in the particular context of Title IX. 544 U.S. at 174-175. The Court further emphasized that Title IX involves only one, "broadly written general prohibition on discrimination," and does not contain any other provisions "list[ing] *any* specific discriminatory practices." *Id.* at 175. While acknowledging that a more narrow reading of "discrimination" could be warranted by Congress's "failure to mention one such practice" in a statute like Title VII of the Civil Rights Act of 1964, which has multiple provisions "spell[ing] out in greater detail the conduct that constitutes discrimination" (including a provision that "expressly" prohibits retaliatory acts), *Jackson* explained that Title VII is a "vastly different statute" and that the failure to include such detail in Title IX's sole anti-discrimination provision "does not tell us anything about whether [Congress] intended" retaliation to be covered. *Ibid.*

Instead, the Court concluded that its earlier interpretation of the "general prohibition on racial discrimination" in 42 U.S.C. 1982 as authorizing an inferred private right of action for retaliation in *Sullivan* likely influenced Congress in its 1972 enactment of Title IX—

just three years after *Sullivan*. *Jackson*, 544 U.S. at 176. The Court thus ultimately found that Title IX incorporates the same understanding of "discrimination" reflected in *Sullivan*. *Id.* at 176-177.

Jackson reinforces the settled rule of statutory construction that context matters. See *Textron Lycoming Reciprocating Engine Div., Avco Corp.* v. *UAW*, 523 U.S. 653, 657 (1998) (It is a "fundamental principle of statutory construction" that "the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.") (quoting *Deal* v. *United States*, 508 U.S. 129, 132 (1993)). In fact, *Jackson* concluded that an interpretive approach that might be appropriate for Title VII's more detailed provisions was inappropriate in the context of Title IX.[3]

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[3] The United States' amicus brief in *Jackson* likewise explained that a "general nondiscrimination provision does not invariably encompass a prohibition against discriminatory retaliation" and that "[o]ther relevant indicators of statutory intent could show that retaliation is *categorically excluded* from a broad nondiscrimination provision." U.S. Br. at 10 n.1, *Jackson*, *supra* (No. 02-1672) (emphasis added). As discussed, here, unlike *Jackson*, there are numerous indicators of statutory intent—including the fact that Congress explicitly included an anti-retaliation right in the ADEA's private-sector provisions, but omitted any such right in the Act's federal-sector provision—that demonstrate that Section 633a(a) does not confer an anti-retaliation right.

The statutory context is also markedly different for retaliation claims under 42 U.S.C. 1981, which are at issue in *CBOCS West, Inc.* v. *Humphries*, cert. granted, No. 06-1431 (Sept. 25, 2007). Like the statute at issue in *Jackson*, Section 1981 involves a private right of action that has been inferred by this Court. See, *e.g.*, *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 459-460 (1975). Since it was amended by the Civil Rights Act of 1991, the statutory framework of Section 1981 is no longer as abbreviated as the Title IX provision construed in *Jackson*, but it still lacks the complex, inter-related

In light of the different statutory context and in particular the separate prohibitions of age discrimination and retaliation in the private-sector provisions of the ADEA, this case is "vastly different" (544 U.S. at 175) from *Jackson*. A comparison of different provisions *within* a statute is one of the most reliable measures of congressional intent. Not only is it "fundamental that a section of a statute should not be read in isolation from the context of the whole Act," *Richards* v. *United States*, 369 U.S. 1, 11 (1962), it is well-established that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello*, 464 U.S. at 23 (citation omitted). And, of course, Congress's decision to address federal employment separately at the same time it extended the private-sector provisions to state governments makes it particularly difficult to dismiss the absence of a standalone retaliation prohibition in Section 633a(a).

Consequently, *Jackson*'s recognition that Title VII is "vastly different" from Title IX because Title VII contains multiple provisions "spell[ing] out in greater detail" the conduct that constitutes "discrimination" (including a provision governing retaliation) supports the

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provisions of Title VII or the ADEA. Moreover, this Court's decision in *Sullivan* has particular salience for the interpretation of 42 U.S.C. 1981. In *Sullivan*, this Court held that "the general prohibition on racial discrimination" contained in 42 U.S.C. 1982 provides a cause of action for "retaliation against those who advocate the rights of groups protected by that prohibition," *Jackson*, 544 U.S. at 176 (describing *Sullivan*), and, in light of their common history, it has construed Section 1981 and Section 1982 in parallel. See, *e.g.*, *Tillman* v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 440 (1973).

conclusion that Section 633a(a) of the ADEA does *not* embody a prohibition on retaliation. 544 U.S. at 175. Like Title VII, the ADEA contains multiple provisions governing "discriminatory" acts in different contexts, see, *e.g.*, 29 U.S.C. 623(a)(1), (b) and (c)(1), 633a(a), and specifically includes language in Section 623(d) prohibiting retaliation by banning "discrimination" based on an individual's opposition to an unlawful practice or participation in EEO activity. 29 U.S.C. 623(d).

Moreover, the ADEA, unlike Title IX, contains an express, rather than an inferred, right of action. The *Jackson* court emphasized that this feature distinguished its analysis of Title IX from one appropriate for Title VII, see *Jackson*, 544 U.S. at 175 (citing *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283-284 (1998)), and, in contexts concerning inferred rights of action, this Court has recognized the need for a "measure of latitude to shape a sensible remedial scheme that best comports with the statute." *Gebser*, 524 U.S. at 284. Indeed, because "Title IX's enforcement scheme would unravel" and "the underlying discrimination would go *unremedied*" if "retaliation were not prohibited," the Court in *Jackson* construed Title IX's use of the term "discrimination" in light of that remedial concern. 544 U.S. at 180-181 (emphasis added).

As discussed below, the same stark remedial concern is not presented in this case because there are other provisions of federal law that generally protect federal employees from retaliation in the workplace. See Part B, *infra*. More fundamentally, however, the *Jackson* analysis for interpreting the scope of an inferred cause of action based on an unelaborated prohibition on "discrimination" in the absence of a statutory enforcement provision simply does not extend to statutes—like the

ADEA or Title VII—that establish express causes of action and contain additional relevant text that directs and confines the Court's inquiry into such matters. See 544 U.S. at 175 (Title VII is "a vastly different statute from Title IX" because "Title IX's cause of action is implied, while Title VII's is express.").[4]

b. Congress underscored its intent to separate the federal-sector prohibitions in Section 633a(a) from the ADEA's private-sector provisions—including Section 623(d)—when it amended the ADEA in 1978 to clarify that "[a]ny personnel action * * * referred to in [Section 633a(a)] shall not be subject to, or affected by, any provision of [the ADEA] other than the provisions of [S]ection 631(b)" and Section 633a. See Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 5(e), 92 Stat. 191 (29 U.S.C. 633a(f)). As this Court has stressed, that provision "clearly emphasized that [Section 633a] was self-contained and unaf-

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[4] Petitioner advances multiple arguments based on *Jackson*, each of which extends *Jackson*'s (or *Sullivan*'s) interpretation of a stand-alone anti-discrimination provision well beyond the contextual limits expressed by *Jackson* itself. See, *e.g.*, Br. 13-14 (retaliation is "discrimination" based on age because it is an intentional response to the nature of a complaint based on age); *id.* at 16 (*Jackson* controls when specific discrimination provision uses sweeping terms such "any" or "all"); *id.* at 17-18, 37 (*Sullivan*'s interpretation of inferred right of action in 42 U.S.C. 1982 would have guided Congress's understanding of Section 633a(a) under *Jackson*'s reasoning). Each such argument fails for the same reasons: 1) text and context matter in statutory construction, and the textual and contextual indications that Section 633a(a)'s prohibition on discrimination does not do the work of the separation prohibitions on discrimination and retaliation in Section 623 are overwhelming, and 2) courts inferring a cause of action have a responsibility to make the resulting cause of action workable and sensible, while courts interpreting two different express causes of action have a responsibility to give Congress's very different approaches different effects.

fected by other sections" of the Act, *Lehman*, 453 U.S. at 168, and so courts were not free to engraft provisions applicable to private employers that were omitted from Section 633a.

The Court in *Lehman* thus concluded that this exclusivity provision in Section 633a(f) supported its conclusion that Section 633a's civil-action provision did not authorize jury trials in suits brought by federal employees where Congress enacted an express jury-trial right in the Act's private-sector provisions yet failed to provide for a comparable right in Section 633a. 453 U.S. at 168. The same reasoning counsels decisively against importing the express prohibition on retaliation in the Act's private-sector provisions (*i.e.*, Section 623(d)) into the federal-sector provisions of the ADEA. Indeed, if anything the conclusion is stronger here than in *Lehman* because in this case petitioner is asking this Court to recognize a new substantive cause of action not expressly delineated in Section 633a, rather than simply flesh out the procedures for the discrimination prohibition that Congress clearly authorized in Section 633a.

That conclusion is bolstered by the origins of Section 633a(a). Before Congress enacted Section 633a in 1974, it had briefly considered making federal and state governments subject to the private-employer provisions of the Act by amending the definition of "employer" to include both the United States and the several states, 118 Cong. Rec. 7746 (1972) (statement of Sen. Bentsen) (introducing S. 3318, 92d Cong., 2d Sess. (1972)), but ultimately used that method only with respect to the states, while enacting Section 633a to apply specially to the federal government. See FLSA Amendments § 28(a)(2) and (b)(2), 88 Stat. 74. Congress was undoubtedly aware in 1974 that the newly enacted Section 633a

did not include text similar to the prohibition on retaliation in Section 623(d), and Congress subsequently "emphasized" (*Lehman*, 453 U.S. at 168) its intent to treat Section 633a as a stand-alone provision for federal personnel actions when it enacted Section 633a(f) four years later in 1978.[5]

Congress's treatment of other employment statutes in the same time frame highlights that Congress knew how to subject the federal government to an express retaliation provision when it wanted to. The FLSA Amendments, which added Section 633a to the ADEA, also made the United States subject to an express retaliation prohibition within the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.* See FLSA Amendments § 6(a)(2), 88 Stat. 58 (amending 29 U.S.C. 203(e)(2) to extend FLSA to federal employees); 29 U.S.C. 215(a)(3) (making it unlawful to "discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to" the FLSA). The fact that Congress amended the FLSA in 1974 to extend its retaliation provision to federal employees at the same

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[5] Petitioner contends (Br. 43) that Section 633a(f) was intended to have the opposite effect, that is, to "ensure that limitations and restrictions [favorable to employers] found in the ADEA's private-sector provisions [were] not incorporated into the federal-sector provision." The legislative history, however, indicates that Congress more broadly intended Section 633a to be "independent of any other section of the act" (except for Section 631(b)), H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 11 (1978), and that history matches the broad text of Section 633a(f). Consequently, Section 633a(f) makes Section 633a(a)'s prohibition on discrimination in federal "personnel actions" self-contained, such that none of the distinct private-sector provisions of the Act, whether favorable or unfavorable to employees, could be engrafted onto Section 633a. Cf. *Lehman*, 453 U.S. at 168.

time that it was creating a distinct statutory scheme in the ADEA for federal employees is another indication that Congress did not want to confer the retaliation right that petitioner asks this Court to infer.

B. The Unique Manner In Which Congress And The Executive Branch Have Addressed Retaliation In The Federal-Sector Context Confirms That Congress Did Not Create An Anti-Retaliation Right In Section 633a(a)

The history of congressional and executive branch responses to the problem of discrimination in federal employment likewise confirms that Section 633a(a)'s prohibition on age discrimination does not extend to retaliation. That history reflects a distinct set of public policy concerns in the civil service sector as well as a tradition—both before and after the enactment of the ADEA—of drawing a clear distinction between retaliation and substantive discrimination in federal employment in both regulatory and statutory text.

Congress is presumed to have been aware of that history when it enacted Section 633a of the ADEA. See *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-185 (1988). In light of that history, the natural conclusion is that Congress concluded in 1974 that existing regulations prohibiting retaliation in the EEO process would apply to age-based complaints by covered federal employees and, in 1978, codified that regulatory prohibition as part of the Civil Service Reform Act. Such congressional attention to the problem of retaliation and Congress's codification of remedies appropriate in the civil service context further counsel against interpreting Section 633a(a) as an independent prohibition on retaliation.

1. The resolution of retaliation claims within the civil service system implicates distinct policy considerations

not present in the private-sector context. Because no alternative existed to address private-sector retaliation in 1967, a statutory prohibition on retaliation and a means for enforcing that prohibition was essential when Congress enacted Section 623(d) of the ADEA. The civil service system, in contrast, already included a process for addressing EEO retaliation complaints when Congress enacted Section 633a(a) in 1974, and, rather than establish a new process for addressing retaliation claims, Congress understandably focused its efforts on a statutory prohibition on age discrimination that could be addressed in that administrative process.

In light of the availability of impartial review for personnel actions within federal agencies and the CSC (which was itself subject to judicial review), the choice to leave retaliation claims for resolution within the civil service process by decisionmakers familiar with the often-complicated nature of federal personnel practices strikes a reasonable balance between efficiency and the need to protect the integrity of the EEO complaint process. That need to balance workplace protections and efficiency led this Court in *Bush* v. *Lucas*, 462 U.S. 367 (1983), to defer to the pre-CSRA civil service process for resolving federal employees' complaints of retaliation for exercising First Amendment rights, even though Congress had not directly spoken to the availability of such relief and "civil service remedies were not as effective as an individual damages remedy" in federal court. See *id.* at 372, 378, 388-389.

In *Bush*, the Court observed that "[f]ederal civil servants are now protected by an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures—administrative and judicial—by which improper action

may be redressed." 462 U.S. at 385. In light of that scheme, the Court observed that "[t]he question is not what remedy the court should provide for a wrong that would otherwise go unredressed," but "whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy." *Id.* at 388. Moreover, the Court observed that that "question obviously cannot be answered simply by noting that existing remedies do not provide complete relief for the plaintiff," and that such a "policy judgment should be informed by a thorough understanding of the existing regulatory structure and the respective costs and benefits that would result from the addition of another remedy for violations of employees' First Amendment rights." *Ibid.*

Congress, of course, was entitled to consider those same considerations in deciding whether to enact a separate cause of action for retaliation against federal employees in the ADEA. And the same factors that caused this Court to refrain from inferring a separate cause of action in *Bush*, *a fortiori*, counsel in favor of respecting Congress's judgment. Indeed, as this Court observed in *Bush*, Congress has "developed considerable familiarity with balancing governmental efficiency and the rights of employees" and "a special interest in informing itself about the efficiency and morale of the Executive Branch," including that of "lower-level Government employees." 462 U.S. at 389. In addition, Congress may "inform itself through factfinding procedures such as hearings that are not available to the courts." *Ibid.* Accordingly, the courts should be particularly reluctant to read new rights and remedies into statutes that Congress has passed concerning federal employees to en-

sure that they do not mistakenly disrupt the balance that Congress has intentionally struck between "governmental efficiency and the rights of employees" (*ibid.*) in any given context.

2. Before Congress applied either Title VII or the ADEA to federal personnel actions, discrimination in federal employment was prohibited by executive order as authorized by statute. See Exec. Order No. 11,478, 3 C.F.R. 803 (1966-1970) (stating non-discrimination policy and requiring prompt, fair, and impartial complaint process); see, *e.g.*, 5 U.S.C. 3301, 3302, 7151-7154 (1970). Federal civil service regulations implemented that policy by establishing an EEO complaint process and expressly prohibiting retaliation for activities related to such complaints. Cf. 5 U.S.C. 1301 (1970). Those regulations authorized executive branch employees to bring EEO complaints regarding matters believed to be discriminatory, including "personnel action[s]," 5 C.F.R. 713.211, 713.214(a)(1)(i) (1972), and further provided that such complainants, their representatives, and witnesses "shall be free from restraint, interference, coercion, discrimination, or reprisal" for participating in the complaint process. 5 C.F.R. 713.214(b), 713.218(e), 713.219(a) (1972); see also Exec. Order No. 10,987, 3 C.F.R. 520 § 3(6) (1959-1963) (employees "shall be assured freedom from restraint, interference, coercion, discrimination, or reprisal" for appealing adverse employment actions).

Before 1974, the regulations provided a two-tiered process for addressing discrimination complaints based on the severity of the disputed personnel action.[6] More

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[6] The regulations were revised in 1974 to establish a single administrative process for all complaints alleging either a discriminatory

serious personnel actions, such as removal, suspension, or a reduction in rank or pay (known as an "adverse action"), could be challenged before the employing agency and appealed to the CSC, see 5 C.F.R. 713.219(a) and (b), 752.101, 771.202, 771.208 (1972), whereas other personnel actions and "any [other] matter of concern or dissatisfaction" to the complainant could be challenged under alternative agency hearing procedures followed by an appeal to the CSC. See 5 C.F.R. 713.217(b), 713.218, 713.219(a) and (c), 713.231(a), 771.302(a) (1972). Retaliation was prohibited regardless of the manner of review. See 5 C.F.R. 713.219(a) and (c) (1972) (applying Part 713 anti-retaliation provisions to all discrimination complaint procedures except certain administrative appeals to the CSC); 5 C.F.R. 771.105(a)(1) and (b)(1), 771.211(e) (1972) (anti-retaliation provisions for proceedings before the CSC). Personnel actions ultimately determined to be improper or erroneous were required to be corrected with remedial action, 5 C.F.R. 713.204(d)(7)-(8), 713.221(c) (1972), and, if appropriate, back pay. See 5 C.F.R. 550.803(d), 550.804 (1972). And limited judicial review was available. See, *e.g.*, *Frommhagen* v. *Klein*, 456 F.2d 1391, 1393 (9th Cir. 1972); *Predmore* v. *Allen*, 407 F. Supp. 1067, 1071-1072 & n.8 (D. Md. 1976) (reviewing reprisal claim under 1969 regulations); cf. *United States* v. *Fausto*, 484 U.S. 439, 444-445, 454 (1988).

Those regulations were revised after Congress amended Title VII in 1972 to codify the prohibition on discrimination in federal "personnel actions" based on race, color, religion, sex, or national origin. See Equal

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matter or discriminatory "personnel action" with subsequent review by the CSC. See 5 C.F.R. 713.214(a)(1)(i), 713.219, 713.231 (1975).

Employment Opportunity Act of 1972 (EEO Act), Pub. L. No. 92-261, § 11, 86 Stat. 111 (42 U.S.C. 2000e-16). That amendment authorized the CSC to enforce that prohibition and to issue "rules, regulations, orders, and instructions" to carry out its responsibilities under the amendment. *Ibid.*

The CSC "revised" its existing EEO regulations later in 1972 both to implement Title VII "and to strengthen the [existing] system of complaint processing" pursuant to the CSC's pre-existing authority under statute and executive order as well as its rulemaking authority under Title VII (EEO Act § 11, 86 Stat. 111). See 37 Fed. Reg. 22,717 (1972) (listing authority); cf. 5 C.F.R. Pt. 713 (1972) (listing prior authority).

The revised regulations, among other things, continued to distinguish between "complaints of discrimination on grounds of race, color, religion, sex, or national origin," 5 C.F.R. 713.211 (1973), and a charge by a "complainant, his representative, or a witness who alleges restraint, interference, coercion, discrimination, or reprisal in connection with the presentation of a complaint," 5 C.F.R. 713.262(a) (1973). The amendments required "timely investigation and resolution of complaints including complaints of coercion and reprisal," 37 Fed. Reg. at 22,717; 5 C.F.R. 713.220 (1973), and made explicit the process for pursuing such complaints of retaliation. 5 C.F.R. 713.261, 713.262 (1973). The revision likewise made explicit the breadth of remedies available, including, but not limited to the "[c]ancellation of an unwarranted personnel action" and a "full opportunity" to participate in any benefit denied. 5 C.F.R. 713.271(b)(3) and (5) (1973); see 5 C.F.R. 713.262(b)(1) (1973) (CSC "shall require the agency to take whatever action is appropriate" concerning reprisal claim).

When Congress amended the ADEA in 1974 to prohibit age discrimination in federal personnel actions and to authorize the CSC to "provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age," FLSA Amendments § 28(b)(2), 88 Stat. 75 (29 U.S.C. 633a(b)(3)), it would have been aware of the CSC's EEO procedures and its revised regulations clarifying the process for pursuing claims of reprisal. Congress, however, did not enact language for Section 633a(a) to track the specific retaliation language in the regulations and, unlike those regulations, did not adopt language covering all employees who participate in the EEO process as representatives or witnesses. Those omissions presumably reflect the reasonable expectation that the CSC's established EEO process for discrimination complaints, which already included provisions prohibiting and remedying reprisal, would be applied when processing complaints of age discrimination. The CSC promptly followed that obvious course by amending its regulations in 1974 to add age discrimination complaints to its existing EEO process and reprisal regulations. See 5 C.F.R. 713.511 (1975); 39 Fed. Reg. 24,351 (1974).[7]

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[7] Petitioner incorrectly asserts (Br. 26-27) that Congress could not have thought that the CSC's existing regulations prohibiting reprisal would apply to age complaints because age discrimination in federal personnel actions was not prohibited until Section 633a(a) was added to the ADEA in 1974. Because the CSC's regulations had expressly prohibited retaliation for participation in EEO activity well before the federal-sector provisions of either Title VII or the ADEA, and those regulations had consistently barred retaliation in connection with any EEO complaint regardless of the type of discrimination alleged, the only reasonable expectation would have been that the CSC would extend its existing reprisal regulations to the processing of complaints under the ADEA—and the CSC in fact did so, less than three months

Congress ultimately codified the longstanding regulatory prohibition on reprisal based on EEO activity when it enacted the Civil Service Reform Act in 1978. The CSRA prohibited supervisors in executive branch agencies from taking or failing to take any "personnel action against any employee" as "a reprisal for the exercise of any appeal right granted by any law, rule, or regulation." CSRA, Pub. L. No. 95-454, § 101(a), 92 Stat. 1116 (5 U.S.C. 2302(b)(9)). As amended, the CSRA prohibits "personnel action[s]" (including any significant change in duties, responsibilities, or working conditions) taken, not taken, or threatened because of "the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation" or "testifying for or otherwise lawfully assisting any individual in the exercise of any [such] right." 5 U.S.C. 2302(a)(2)(A)(xi) and (b)(9). Since 1978, this provision has generally prohibited retaliation whenever a federal employee seeks relief under civil rights statutes, including the ADEA. See *In re Frazier*, 1 M.S.P.B. 159, 191-197 (1979), aff'd in part and review dismissed in part, 672 F.2d 150 (D.C. Cir. 1981).[8]

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after Congress added Section 633a to the ADEA. See 39 Fed. Reg. at 24,351.

[8] The CSRA's prohibition on retaliation applies generally to executive branch agencies. See 5 U.S.C. 2302(a)(2)(C). However, Congress has exempted from that prohibition certain agencies, including the Central Intelligence Agency and Defense Intelligence Agency, *ibid.*, as well as positions that are exempt from the competitive service either because of their confidential, policy-determining, policy-making, or policy-advocating character, or because the President has excluded them from coverage based on his determination that it is necessary and warranted by good administration. 5 U.S.C. 2302(a)(2)(B). Employees who fall within the scope of those exemptions will not benefit from the CSRA's prohibition of retaliation, and must instead rely on alternative protections, if applicable. The CSRA's

Where retaliation allegedly results in an adverse action (removal, suspension of more than 14 days, or reduction in pay), the CSRA authorizes an appeal to the Merit Systems Protection Board (MSPB) from an agency determination with review by the Federal Circuit. 5 U.S.C. 7512, 7513(d); 5 U.S.C. 7701-7703 (2000 & Supp. V 2005). Claims of retaliation of a less serious nature must be investigated by the Office of Special Counsel, which, if it finds reasonable grounds to believe retaliation occurred, must report that determination to and may seek corrective action from the MSPB with review by the Federal Circuit. 5 U.S.C. 1214(a)(1)(A), (b)(2)(B), (C), and (c), 7703(b). The MSPB may order appropriate corrective action, 5 U.S.C. 1214(b)(4), 7701(b)(2), the payment of attorney's fees on appeal, 5 U.S.C. 7701(g), and may discipline federal employees for retaliatory acts. 5 U.S.C. 1215. See generally *Fausto*, 484 U.S. at 445-446 (discussing CSRA); *Lindahl* v. *OPM*, 470 U.S. 768, 773-774 (1985) (same).[9]

The "comprehensive nature" (*Fausto*, 484 U.S. at 448) of the CSRA's prohibition on retaliation, like the pre-CSRA tradition of expressly prohibiting EEO retaliation by regulation, contrasts sharply with Section 633a(a)'s prohibition on "discrimination based on age" in personnel actions. The difference in language presumably reflects a difference in policy considerations and the balance struck by Congress in this context. The

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limited exemptions, however, reflect judgments by Congress regarding conflicting policy considerations in particular applications which are not uncommon in the context of federal employment. Cf. *Fausto*, 484 U.S. at 448-449; *Bush*, 462 U.S. at 388-389.

[9] The MSPB may also consider claims of age discrimination under the ADEA in addition to claims of retaliation prohibited by the CSRA. See 5 U.S.C. 7702(a)(1); 29 C.F.R. 1614.302.

Court should avoid construing Section 633a in a manner that could disrupt that balance by engrafting onto the existing statutory and administrative framework an additional right not intended by Congress. Section 633a(a) should therefore be read as prohibiting substantive age discrimination, not retaliation based on protected activity—conduct that was addressed by the CSRA's general prohibition against retaliation.[10]

3. While the USPS operates under a distinct personnel system, see 39 U.S.C. 410(a), 1001, 1206(b), 1209(a), that system similarly protects employees like petitioner from retaliatory action. Congress has directed the USPS to "assure its officers and employees * * * full protection of their employment rights by guaranteeing them an opportunity for a fair hearing on adverse actions," 39 U.S.C. 1001(b), and the USPS *ELM* broadly prohibits "*any* action, event, or course of conduct that * * * subjects any person to reprisal for prior involvement in EEO activity." *ELM* § 665.23, at 681-682 (emphasis added).

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[10] Congress has continued the tradition of using precise retaliation language in applying the ADEA to new governmental contexts. The Congressional Accountability Act of 1995, 2 U.S.C. 1301 *et seq.*, and the Presidential and Executive Office Accountability Act, 3 U.S.C. 401 *et seq.*, both extend Section 633a(a) to prohibit "discrimination based on age" in personnel actions affecting congressional employees and employees within the Executive Office of the President and Executive Residence of the White House. 2 U.S.C. 1311(a)(2); 3 U.S.C. 411(a)(2). Both statutes separately make it unlawful "to intimidate, take reprisal against, or otherwise discriminate against, any covered employee because the covered employee has opposed any practice made unlawful by" the acts or "has initiated proceedings, made a charge, or testified, assisted or participated in any manner in a hearing or other proceeding under" the acts. 2 U.S.C. 1317(a); 3 U.S.C. 417(a).

That prohibition on retaliation applies both to USPS employees who are not covered by a collective bargaining agreement as well as to those who work under a collective bargaining agreement, as all such agreements incorporate the provisions of the *ELM*. See, *e.g.*, *Mail Handlers Agreement* art. 19; *Harrell* v. *USPS*, 445 F.3d 913, 923 (7th Cir.) ("We agree with our sister circuits that Article 19 is sufficient to incorporate the postal handbooks and manuals relating to wages, hours or working conditions into the National Agreement."), cert. denied, 127 S. Ct. 845 (2006). Those employees who are subject to collective bargaining agreements also are protected from discipline without "just cause," which encompasses retaliation for EEO activity. See *Mail Handlers Agreement* art. 16.1; *National Agreement* art. 16.1. The same was true at the time the ADEA was enacted. See USPS & American Postal Workers Union, *National Collective Bargaining Agreement* art. XVI (July 20, 1971)<http://www.apwu.org/dept/ind-rel/sc/oldcbas/APWU%20Contract%201971-1973.pdf>. Thus, while petitioner does not have a cause of action for alleged retaliation under the ADEA, she is not without a means of recourse for remedying any retaliation. See *ELM* §§ 666.21-666.26, at 685-686 (listing overlapping remedial procedures).

C. Material Textual Differences Between Title VII And The ADEA Support The Conclusion That Section 633a(a) Does Not Prohibit Retaliation.

Petitioner contends that Title VII prohibits retaliation in federal personnel actions and that the ADEA should be read in the same way. Br. 4, 19-20. Although the ADEA's federal-sector provisions were in many respects modeled after those in Title VII, material textual

differences between the acts as to the question presented demonstrate that Section 633a(a) does not include a prohibition on retaliation. Indeed, the textual differences between Title VII and the ADEA only strengthen the conclusion that Congress did not intend to adopt an anti-retaliation right in Section 633a(a). This Court reached a similar conclusion in *Smith* v. *City of Jackson*, 544 U.S. 228 (2005), where it observed that "textual differences between the ADEA and Title VII make it clear that even though both statutes authorize recovery on a disparate-impact theory, the scope of disparate-impact liability under [the] ADEA is narrower than under Title VII." *Id.* at 240.

As petitioner explains, Title VII's federal-sector provision expressly provides that several of Title VII's private-sector provisions shall apply to civil actions brought by federal employees under 42 U.S.C. 2000e-16. Specifically, Title VII's federal-sector provision provides that Section 2000e-5(f) through (k) of title 42, "as applicable, shall govern civil actions brought" by federal employees under Section 2000e-16, see 42 U.S.C. 2000e-16(d). One of those expressly incorporated provisions concerns the remedies available to address claims of private-sector retaliation. Specifically, that provision states that courts shall not order the hiring, reinstatement, or promotion of any individual as an employee or the payment of back pay if the allegedly discriminatory action that injured him was taken "for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a)." 42 U.S.C. 2000e-5(g)(2)(A). The cross-referenced provision (Section 2000e-3(a)), like Section 623(d) of the ADEA, expressly prohibits retaliation for EEO activity in the private sector.

Although the question is not presented here, several courts of appeals have concluded that Title VII's federal-sector requirement that personnel actions be free from "discrimination based on race" or other protected traits, 42 U.S.C. 2000e-16(a), should be read to extend to retaliation in light of Section 2000e-16(d)'s incorporation of a provision that itself expressly references the act's private-sector retaliation provision.[11] But the relationship between the federal- and private-sector provisions of the ADEA is completely different. Rather than incorporate selective private-sector provisions for use in Section 633a, Congress specifically provided that "[any] personnel action[s] * * * referred to in subsection (a) of [Section 633a] shall not be subject to, or affected by, any [private-sector] provisions" in the Act. 29 U.S.C. 633a(f). As this Court explained in *Lehman*, Congress thus "clearly emphasized" in Section 633a(f) "that [Section 633a] was self-contained and unaffected by other sections * * * applicable in actions against private employers." *Lehman*, 453 U.S. at 168. That express rejection of the approach adopted by Congress in Title VII mandates that the contextual interpretation of Title VII advanced by petitioner cannot apply to the ADEA.

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[11] See, *e.g.*, *Hale* v. *Marsh*, 808 F.2d 616, 619 (7th Cir. 1986); *Ayon* v. *Sampson*, 547 F.2d 446, 449-450 (9th Cir. 1976). This case presents no occasion to resolve whether Title VII's federal-sector provision incorporates that act's private-sector retaliation prohibition. The salient point for present purposes is that, even assuming petitioner's reading of Title VII to be correct, the ADEA is distinguishable from Title VII because it does not incorporate any portion of the Act's private-sector provisions. See 29 U.S.C. 633a(f).

D. The ADEA's Legislative History Provides No Support For Petitioner's Claim That Section 633a(a) Prohibits Retaliation

Although it is not necessary to resort to legislative history to resolve this case given the strong textual evidence that Section 633a(a) does not confer an anti-retaliation right, the pertinent legislative history is silent with respect to the question presented and therefore provides no support for petitioner's claim nor any justification for deviating from the statute's plain text.

Petitioner all but concedes the absence of relevant history by arguing that the ADEA's "legislative history is as revealing for what it does not say as for what it does." Br. 29. "Judicial investigation of legislative history" can be complicated enough when a court reviews actual statements by legislators, which are "often murky, ambiguous, and contradictory." *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). Petitioner's affirmative reliance on silence is not an appropriate means of construing legislative intent regarding Section 633a(a). In any event, especially when viewed against the protections available to federal employees discussed in Part B above, the absence of any indication in the legislative record that Congress believed that Section 633a(a) would confer a cause of action to redress retaliation is, if anything, the most telling "dog that didn't bark."

The few statements that petitioner does cite—regarding the application of "one set of rules," "remov[ing] discriminatory barriers," enacting the "*same protections* against arbitrary employment based on age," and the desire to impose equivalent "restrictions," Br. 30 (citations omitted)—are all consistent with expressions con-

cerning the Act's substantive ban on age discrimination. Petitioner's Rorschach-test interpretation notwithstanding, the ADEA's legislative history simply does not speak to whether Section 633a(a) prohibits retaliation based on an employee's EEO activity.

Nor does legislative history regarding the 1972 extension of Title VII to federal employment help petitioner's cause. Br. 22-23. While some of that history indicates that the CSC's EEO regulations were not entirely effective in processing discrimination complaints before 1972, it does not address whether the regulations were effective in preventing and redressing retaliation or whether Congress understood the CSC's enhanced regulations to have the same difficulties when Section 633a(a) was enacted in 1974. Petitioner's reliance on legislative history is accordingly unavailing.

E. Neither The CSC Nor The EEOC Has Definitively Interpreted Section 633a(a) To Prohibit Retaliation

Petitioner's contention (Br. 22-23, 31-33) that regulations issued by the CSC and the EEOC have interpreted Section 633a(a) as prohibiting retaliation is incorrect. Those regulations confirm that both the CSC and the EEOC continued to treat age discrimination and retaliation as distinct types of charges after the ADEA's enactment.[12] While petitioner suggests that one CSC regulation treated allegations of retaliation "as an individual

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[12] Compare 5 C.F.R. 713.211 (1975) ("[C]omplaints of discrimination on grounds of race, color, religion, sex, or national origin" must be processed under 5 C.F.R. 713.212-.222 (1975)) and 5 C.F.R. 713.511 (1975) (extending Part 713 provisions to govern "processing of complaints of discrimination on account of age"), with 5 C.F.R. 713.262(a) and (b) (1975) (separate provisions governing "charge[s] of restraint, interference, discrimination, or reprisal in connection with the presentation" of a "complaint of discrimination").

complaint of discrimination" (Br. 34), that provision merely provided employees with a "[c]hoice of review procedures" for retaliation allegations, which could be "reviewed as an individual complaint of discrimination" under one set of procedures *or* "as a charge subject to" other procedures unique to retaliation claims. 5 C.F.R. 713.262(a) (1975). That claim-processing regulation, which was retained by the EEOC when it assumed the CSC's ADEA authority in 1978 and was repromulgated by the EEOC in 1987, see 29 C.F.R. 1613.262(a) (1988), lends no support to petitioner's view that the CSC and the EEOC treated retaliation as a subset of age discrimination. Rather, it shows the opposite to be true.

Nor do the EEOC's current regulations conclusively resolve the matter. When the EEOC "consolidat[ed] the complaint processing procedures" in 1992 by replacing repetitive provisions that separately addressed "each type of complaint" under Title VII, the ADEA, and other discrimination statutes with a standard set of regulations generally applicable to complaints of discrimination and retaliation, it stated that retaliation claims under those statutes (including the ADEA) "are considered to be complaints of discrimination for purposes of" the revised regulations. See 57 Fed. Reg. 12,634, 12,647 (1992) (promulgating 29 C.F.R. 1614.103(a)). That provision merely ensures that retaliation claims are *processed* in the same manner as discrimination claims. See *id.* at 12,642 ("Whenever any regulation in this part speaks of a complaint of discrimination, the reference should also be read to include a complaint of retaliation."). Like its regulatory predecessors, that portion of the EEOC's claim-processing regulations does not support petitioner's position because it does not reflect a substantive interpretation of Section 633a(a).

The EEOC's regulations do contain a "[g]eneral policy" statement that "[n]o person shall be subject to retaliation for opposing any practice made unlawful by * * * [the ADEA and various other statutes] or for participating in any stage of administrative or judicial proceedings under those statutes." 29 C.F.R. 1614.101(b). But that statement—added in 1992—does not purport to be a construction of Section 633a(a) of the ADEA (or any other specific provision of the Act) and, as discussed above, executive branch employees who face reprisals for EEO activity under the ADEA do have recourse under the CSRA and the related administrative regime. Accordingly, petitioner's reliance on the EEOC regulations is misplaced.[13]

F. The Court's Reluctance To Broadly Construe Waivers Of Sovereign Immunity Counsels Against Reading Section 633a(a) To Confer An Anti-Retaliation Right

Because the text, structure, and relevant background surrounding Section 633a(a) demonstrate that the provision does not prohibit retaliation against employees for

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[13] Petitioner's reliance on a partial quotation from a footnote in the *EEOC Compliance Manual* is also unavailing. The full quotation shows that the footnote describes the state of the case law at the time. See *EEOC Compl. Man.* § 8-1(A) n.5 (May 20, 1998) <http://www.eeoc.gov/policy/docs/retal.pdf> ("Federal employees are also protected against retaliation under each of the employment discrimination statutes. *See, e.g., Hale v. Marsh*, 808 F.2d 616, 619 (7th Cir. 1986) (recognizing retaliation cause of action for federal employees under Title VII); *Bornholdt v. Brady*, 869 F.2d 57, 62 (2d Cir. 1989) (recognizing retaliation cause of action for federal employees under ADEA)."). Moreover, the *EEOC Compliance Manual*'s reference to retaliation under the ADEA is of no assistance to petitioner because it is based on a decision that treats retaliation for EEO activity under the ADEA as prohibited by the CSRA, not the ADEA. See *Bornholdt*, 869 F.2d at 62.

participating in EEO activity, this Court need not invoke sovereign immunity principles to resolve this case. However, if the text of Section 633a(a) were sufficiently ambiguous, those principles would require that Section 633a(a) be read narrowly as prohibiting substantive age discrimination, but not retaliation.

It is well settled that a waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States* v. *King*, 395 U.S. 1, 4 (1969)); see *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 95 (1990). The statutory language of a waiver must therefore be "specific and express," *King*, 395 U.S. at 4, and cannot be enlarged beyond what the language plainly requires. *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992); see *Lane* v. *Pena*, 518 U.S. 187, 191-192 (1996). And waivers of the United States' immunity from suit "'must be construed strictly in favor of the sovereign.'" *Nordic Vill.*, 503 U.S. at 34 (quoting *McMahon* v. *United States*, 342 U.S. 25, 27 (1951)).

Those principles constrain the Court's interpretation of Section 633a of the ADEA. See *Lehman*, 453 U.S. at 160, 162 n.9. Congress's waiver of sovereign immunity in Section 633a(c) authorizes aggrieved persons to bring a civil action against the federal government for "such legal or equitable relief as will effectuate the purposes of" the Act. 29 U.S.C. 633a(c). The question presented in this case goes to the scope of the waiver effected by Section 633a(c)—*viz.*, whether recognizing a retaliation remedy in the federal-sector context is necessary to "effectuate the purposes of" the Act. The answer to that question turns not on broad equitable considerations but on whether the text of the federal-sector provisions guarantees such a remedy. In that regard, subsection

(a) and subsection (c) of Section 633a go hand in hand to define the scope of the federal government's waiver of sovereign immunity from suit.

In "traditionally sensitive areas" such as the sovereign's consent to suit, "the requirement of [a] clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *INS* v. *St. Cyr*, 533 U.S. 289, 299 n.10 (2001) (quoting *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991), and citing *Nordic Vill.*, 503 U.S. at 33). And such caution is particularly warranted in the context of the rights and remedies granted to federal employees, since any decision by the sovereign to subject itself to suit on such matters requires a delicate balancing of "governmental efficiency and the rights of employees." *Bush*, 462 U.S. at 389.

Petitioner incorrectly contends (Br. 49-50) that whether Section 633a(a) encompasses retaliation claims is not a matter subject to strict construction analysis under Court's decisions involving the Indian Tucker Act, 28 U.S.C. 1505. The Indian Tucker Act contains a waiver of immunity from money-mandating claims based on "the Constitution, laws or treaties of the United States, or Executive orders of the President," *ibid.*, and, in that context, this Court has concluded that the "United States has presumptively consented to suit" to claims that "fall[] within the terms" of that act. *United States* v. *Navajo Nation*, 537 U.S. 488, 502-503 (2003) (quoting *United States* v. *Mitchell*, 463 U.S. 206, 216 (1983)). The ADEA, in contrast, does not provide a waiver of immunity from a general category of claims under other statutes. Because Congress waived sovereign immunity in Section 633a(c) only with respect to claims "for such legal or equitable relief as will effectu-

ate the purposes" of the Act, and included that waiver in Section 633a, it would be anomalous to interpret the scope of Congress's waiver independently from the limits of Section 633a(a).

Petitioner's view (Br. 45-46) that the Postal Reorganization Act's waiver of immunity for the USPS, 39 U.S.C. 401(1), obviates the need to apply a strict construction rule here is also misplaced. That view, shared by the court of appeals (see Pet. App. 4a), fails to account for the fact that Congress intended Section 633a of the ADEA to apply to a wide range of federal agencies for which the Act constitutes the pertinent waiver of immunity. Congress clearly would not have intended the scope of Section 633a—or the meaning of the words in the provision—to vary depending on the agency involved. Cf. *Clark* v. *Martinez*, 543 U.S. 371, 380 (2005); *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685 (1983).

To the extent there is any reasonable doubt as to the answer to the question presented, the canon of strict construction ultimately compels the conclusion that the Section 633a(a) prohibits only discrimination based on the individual victim's age, not retaliation. As the contrast with the express anti-retaliation right in Section 623(d) starkly demonstrates, the language in Section 633a(a) does not "unequivocally" encompass retaliation, much less "specific[ally] and express[ly]" subject the United States to liability for retaliation. Cf. *Nordic Vill.*, 503 U.S. at 34 (waiver does not unambiguously extend to relief sought if provision is susceptible to alternative interpretations). Accordingly, even putting aside the strong textual evidence discussed above that Congress did not intend Section 633a(a) to confer an anti-retaliation right, settled principles of statutory con-

struction governing suits against the federal government would compel that result.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 5 U.S.C. 2302 provides in relevant part:

Prohibited personnel practices

(a)(1) For the purpose of this title, "prohibited personnel practice" means any action described in subsection (b).

* * * * *

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

* * * * *

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of—

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation; [or]

(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A)[.]

* * * * *

2. 29 U.S.C. 623 provides in relevant part:

Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age[.]

* * * * *

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

* * * * *

3. 29 U.S.C. 630(b) provides:

Definitions

For purposes of this chapter—

* * * * *

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided,* That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

* * * * *

4. 29 U.S.C. 631(b) provides:

Age Limits

* * * * *

(b) Employees or applicants for employment in Federal Government

In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 633a of this title, the prohibitions established in section 633a of this title shall be limited to individuals who are at least 40 years of age.

5. 29 U.S.C. 633a provides in relevant part:

Nondiscrimination on account of age in Federal Government employment

(a) Federal agencies affected

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the Government Accounting Office, and the Library of Congress shall be made free from any discrimination based on age.

* * * * *

(c) Civil actions; jurisdiction; relief

Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

* * * * *

(f) Applicability of statutory provisions to personnel action of Federal departments, etc.

Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title and the provisions of this section.

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